1965

Anita Rae Wright v. Paul Dee Wright : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

ANITA RAE WRIGHT,
Plaintiff-Appellant,

— vs. —

PAUL DEE WRIGHT,
Defendant-Respondent.

Case No.

APPELLANT'S BRIEF

Appeal From the Judgment of the Third District Court
for Salt Lake County,
HONORABLE RAY VAN COTT, JR., *Judge*

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Case No. 10262

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an appeal from an order made as a result of an Order to Show Cause. The court, by its action, refused to award custody of two minor children to the plaintiff, their mother. The main question involved is whether or not the plaintiff should be awarded custody of the children and whether or not the welfare of the children would best be served by having their custody in the plaintiff.

DISPOSITION IN THE LOWER COURT

This case was tried to the court on October 26, 1964, on plaintiff's Order to Show Cause and defendant's responsive affidavit. From an order in favor of defendant, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the Order denying her custody of the said minor children.

STATEMENT OF FACTS

The plaintiff, Anita Rae Wright, and the defendant, Paul Dee Wright, were married at Sterling, Utah, on the 25th day of May, 1956 (R-1). They had two children born as issue of the marriage: Leslie Rae, a daughter, who was born November 15, 1957, and Terry Dee, a son, who was born on February 9, 1959. At the time of the hearing of the Order to Show Cause the girl was six and the boy was five years old (TR. 34).

The evidence and record shows that the defendant, on many occasions pushed, hit and shoved the plaintiff and these actions resulted in a divorce (R. 6 and 7). It also shows that defendant was awarded the equity of the parties in the family home and certain furniture and household possessions subject to the encumbrances thereon.

The plaintiff was awarded the custody of the minor children but later, after having been ill and also dis-

tressed by the financial situation she found herself in as a result of the sporadic payments of child support and difficulty of paying her obligations (TR. 30 and 31), the plaintiff felt that the children would be better off, at that time, in the custody of their father, who had a suitable home in which to care for them. Upon approaching the defendant the plaintiff was informed that the defendant would not take the children temporarily, even for a weekend (TR. 31) and would only take them if plaintiff saw his attorney so she couldn't go and get the children after a short time (TR-31).

Plaintiff testified that, at that time, she was "beside myself" and didn't know what to do so saw defendant's attorney. She further stated that the papers "didn't seem to me to be exactly right" (TR. 31), but was told by the defendant and his attorney that it was necessary they were drawn that way and was further told by defendant that as soon as she was able to take care of the children she could have them back (TR. 32).

Plaintiff's Order to Show Cause resulted from the refusal of defendant to restore custody of the children to the plaintiff when requested.

The evidence further showed that defendant is now supporting eight children, five of whom are not his children and lives with his wife in a three-bedroom home. Although the defendant testified once that he earned $400.00 per month he later admitted (TR. 42) that his income was approximately $8,400.00 per year. Defendant

further testified that he intended to adopt five other children (of his present wife) as soon as he could afford it. Defendant also testified that he would allow the plaintiff to visit with the children but would not allow her to take them to California where she resided (TR. 44).

At no time was there any claim whatsoever that plaintiff was unfit and the court specifically stated that there was no showing of unfitness (TR. 51). Rather, the court based its decision to award the custody to the defendant on the grounds that taking the five- and six-year-old from the home where they had resided with other children and a woman not their mother "would disrupt their lives." (TR. 53)

The Order leaving the children in the custody of defendant was entered accordingly.

ARGUMENT

POINT I.

THE COURT ERRED IN AWARDING CUSTODY OF THE MINOR CHILDREN TO THE DEFENDANT.

Although a divorced mother has no absolute right to the custody of minor children under U.C.A. 1953, 30-3-10, the policy of the Supreme Court of the State of Utah has been to give weight to the view that, all things being equal, preference should be given to the mother in awarding custody of a child of tender years.

In the original divorce action in this matter the court found no reason to award custody to the defendant, but rather, awarded custody of the minor children to the plaintiff, their mother. Subsequently, when the plaintiff found that she was unable to properly care for the children because of her own illness and the failure of the defendant to pay the amounts ordered by the court for their support she, acting with complete sacrifice, and against her natural instincts, allowed the defendant to take her children because she felt that, for a temporary period at any rate, the welfare of the children would best be served by having them cared for in their father's home. No claim was made that the plaintiff did not visit her children at every opportunity and try to have their custody as much as was humanly possible for her, and, as soon as she obtained employment and was financially able, as well as able physically to provide for them she requested the defendant to return her children to her but the defendant refused. This refusal was not made on the grounds that she was unfit, but rather, no reason was given other than it would be difficult for the defendant to pay the support of the children because of the fact that he had assumed the responsibility of caring for five other children who were not his own and, in addition, fathered another child by another wife.

In the case of *Briggs* v. *Briggs,* 11 Utah 418, 181 Pac. 2d 223, the court held in a habeas corpus proceeding between divorced parents for the custody of a child under ten years of age that where there was no claim

that the mother was immoral or incompetent, she was entitled to the custody of the child unless it was made to appear that she was an improper person, and the burden of so showing was on the father. This was not shown in this case and, as a matter of fact, the only evidence which was adduced showed that the welfare of the children had always come first with the mother and she was not, in any way, unfit.

In this case the custody of plaintiff's children have more or less been awarded to another woman, who will be in charge of the children during nearly all their waking hours, and to award the custody of a child to another woman, rather than to the natural mother is unnatural and abhorent. It should be done only when it is clearly shown by the evidence that the best interests of the child require such an order. This court in the case of *Walton* v. *Coffman,* 110 Utah 1, 169 Pac. 2d 97, said:

> "We conclude that the determining consideration in cases of this kind is: What will be for the best interest and welfare of the child? That in determining this question there is a presumption that it will be for the best interest and welfare of the child to be reared under the care, custody and control of its natural parent; that this presumption is not overcome unless from all the evidence the trier of the fact is satisfied that the welfare of the child requires that it be awarded to someone other than its natural parent. Thus the ultimate burden of proof on this question is always in favor of the parent and against the other person.

"In addition thereto, this presumption being based on logic and natural inference, should be kept in mind by the trier of the facts and weighed and considered with all the other evidence in determining this question. The common experience of mankind teaches 'that blood is thicker than water,' that usually there is a much stronger attachment between a natural parent and child than is developed between a child and the foster parent, that ordinarily the natural parent is willing to sacrifice its own interest and welfare for the benefit of the child much more than is the case with foster parents and that generally the natural parent is more sympathetic and understanding and better able to get the confidence and love of its own child than anyone else, all of these things are especially true of the natural mother. That these facts should always be kept in mind throughout the trial and given due weight along with all other evidence in the case in determining what will be for the best interests and welfare of the child. However, this presumption is one of fact and not of law, and may be overcome by any competent evidence which is sufficient to satisfy a reasonable mind thereon."

There is no evidence to show that plaintiff has ever been anything but a loving, tender, thoughtful and devoted mother. It is obvious that if the defendant told the truth about his income when he stated he made only $400.00 per month that the plaintiff, even though no child support were awarded, is better capable of providing for her children rather than have them live in a home where $400.00 must be divided among ten people, and where the children must be raised by a woman who is already burdened with the care of an infant child and

five other children all beneath the age of ten years. There is no question that defendant loves his children but his statements would lead one to believe that he is more interested in keeping them in his custody because he fears that he will be unable to provide for five children who are not his legal responsibility in the event he has to put out any money for the support of his natural children.

The defendant made no complaints regarding the manner in which the children were cared for by the plaintiff when they were in her custody but even allowed them to go to Wyoming with her although he denied the right and privilege of visitation with the plaintiff while she was in the State of California earning her livelihood.

The plaintiff, being the mother of the children, will undoubtedly devote more time to her children, will show them greater love and affection than would any other person, no matter how kind and willing the other person might be, and in spite of the statements of defendant's wife that she loves the children as her own it seems difficult to believe that a mother of six children would deprive her own six offspring of any material and important thing in order to care for children who are no relation to her whatsoever, and it would seem only natural to give a little more consideration to one's natural offspring than the children of some other woman.

Based upon the premise that the greater responsibility of caring for children is placed upon the woman of a

household, it seems only natural and reasonable that the welfare of these minor children would best be served and the best interests of the children require that they be placed with their mother as soon as possible.

CONCLUSION

The court, in this case, has deprived the plaintiff of the custody of her two children with no evidence that she was in any way incompetent, improper or morally unfit by reasoning which seems to be based partly on the fact that there is a possibility the children would be raised in a small town rather than a large city, and further based on the fact that the moving of a five- and six-year-old child from a home where there are six other children would in some way disrupt the lives of the children or cause them some distress. The court has made it appear that the natural affection of a mother and her competence to better provide for children and give them a mother's tender loving care is not sufficient to overcome the doubtful advantages of having two children raised in the company of five other children who are totally unrelated to them and who are receiving the bounty of a man other than their father and thereby necessarily depriving the children of benefits which naturally, in the due course of events should belong to them.

The evidence sustains the finding that the plaintiff loves her children, is willing to love and care for them and make sacrifices for them and clearly shows that she did so in the past. Plaintiff will love the children more

and make more efforts in their behalf than can be expected of a step-mother, who is burdened with the duty of caring for six other children of tender age.

Plaintiff is ready, willing and able to make all sacrifices which are necessary to provide a comfortable, secure and loving home life for her children.

On the basis of the evidence and the obvious facts, the Order of the District Court granting custody to the defendant should be reversed and the father should be ordered to contribute according to his means to the support of his children. Plaintiff should further be allowed attorney fees not only for the hearing in the District Court but also for this appeal.

Respectfully submitted,

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